No. 76-1802

Supreme Court, U. S.
FILED
SEP 19 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO, PETITIONER

v.

DAKOTA NATIONAL BANK AND TRUST CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1802

FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO, PETITIONER

v.

DAKOTA NATIONAL BANK AND TRUST CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY

Petitioner contends that the court of appeals erred in reversing the Comptroller of the Currency's determination that petitioner's drive-in banking facility was not a "branch bank" within the meaning of 12 U.S.C. 36(f).

National banks, subject to the approval of the Comptroller, may establish a new "branch" "if such establishment and operation are at the time expressly authorized to State banks by the law of the State * * *." 12 U.S.C. 36(c). The purpose of this provision is to establish competitive equality in branching opportunities between national and state banks. See *First National Bank* v. *Dickinson*, 396 U.S. 122. A "branch" is defined by 12 U.S.C. 36(f) as "includ[ing] any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

In 1971, petitioner, a national bank located in Fargo, North Dakota, had a drive-in teller facility attached to its main office, but urban renewal plans proposed to close the street that gave access to the facility. Accordingly, petitioner applied to the Comptroller for permission to establish, as a "branch", a drive-in teller facility 550 feet in a direct line (1250 feet by the normal route) from its main office. The Comptroller granted the application and the new facility was constructed.

In 1971, North Dakota law had permitted a state bank to operate only one "facility for drive-in and walk-up service" that was "separate and apart from its banking house," and that facility had to be within 1500 feet of its banking house (Pet. App. C, p. A-5). North Dakota law was changed in 1973 to permit each state bank to operate one such facility within a three-mile radius of the limits of the city within which its main office was located (Pet. App. E, pp. A-64 to A-65).[1]

In 1974, petitioner asked the Comptroller to reclassify its drive-in facility as an "extension," rather than a branch, of its main office (Pet. App. C, p. A-5). The Comptroller did so, on the grounds, *inter alia*, that petitioner was physically unable to have a drive-in facility at its main office, no closer property was available, the facility would be dependent upon the main office, and the operation of the facility "had not affected the competitive balance in the market" (*id.* at A-7).

Petitioner then applied to the Comptroller for permission to open a more distant "branch" bank in Fargo. The

---

[1]In addition, North Dakota has established a state-owned bank, the Bank of North Dakota, whose statutory authorization appears to permit unlimited branching. North Dakota Century Code § 6-09-02 (1975) (Pet. App. E, p. A-66).

Comptroller authorized establishment of such a branch. (Pet. App. C, pp. A-8 to A-9). Petitioner's competitor, another national bank, then brought suit in the United States District Court for the District of North Dakota for injunctive and declaratory relief, claiming that petitioner would have two branches in violation of North Dakota law and 12 U.S.C. 36(c). The district court denied relief, but the court of appeals reversed, holding (1) that whether the drive-in facility is a "branch" is a question of a law subject to *de novo* judicial review and not review on an arbitrary and capricious standard, (2) that while that question is one of federal law, petitioner's drive-in facility is a "branch" because state banks, under state law as reflected in the opinions of the State Banking Commissioner and the State Banking Board, would be limited to one such facility, and (3) that the state-owned Bank of North Dakota is not a "state bank" within the meaning of 12 U.S.C. 36(c) or (h) (Pet. App. C).

1. We agree with petitioner that the court of appeals erred in reversing the determination of the Comptroller.

a. While the court purported to recognize the established principle that what is a "branch" within the meaning of 12 U.S.C. 36 is a question of federal law, in resolving that question the court focused almost exclusively on whether as a matter of state law, as reflected in the opinions of state banking administrators, a state bank would be permitted to operate a similar facility similarly located (Pet. App. C, pp. A-18 to A-21). The effect of framing the inquiry in that manner was to give almost conclusive effect to state law and state definitions in determining what constitutes a branch bank within the meaning of a federal statute. The decision thus appears to depart from this Court's teaching in *First National Bank*

v. *Dickinson*, 396 U.S. 122, that federal law alone applies to resolve "the threshold question" of what constitutes a branch (396 U.S. at 133 n. 7, 134) and that "to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers" (396 U.S. at 133). The court of appeals should have determined whether the facility was a "branch" solely by reference to federal law and only then have considered state law in determining whether state law would have expressly authorized a state bank to establish the branch.

b. While the question of what is a branch may be a question of law, it nevertheless turns on the judgmental assessment of a number of factual questions that are peculiarly within the administrative expertise of the Comptroller. Thus the courts have identified a number of factors to be considered, relating to the functions of the facility, its physical location in relation to the main office, its functional dependence on the main office, and, most significantly, its capacity to provide the bank with "a material competitive advantage in securing customers." *Nebraskans for Independent Banking, Inc.* v. *Omaha National Bank*, 530 F. 2d 755, 761 (C.A. 8), vacated and remanded on other grounds, 426 U.S. 310. Accordingly, the ultimate question, although perhaps technically one of law, is not dissimilar to the question considered by the Comptroller in *Camp* v. *Pitts*, 411 U.S. 138, *i.e.*, whether a new bank would be "an uneconomic venture in light of banking needs and the banking services already available in the surrounding community" (411 U.S. at 143)—a question that this Court held to be reviewable on an abuse of discretion standard. Thus, whether a question of law or fact, the Comptroller's determination is entitled to substantial

deference from a reviewing court. Cf. *Udall* v. *Tallman*, 380 U.S. 1, 16; *Gray* v. *Powell*, 314 U.S. 402, 411.[2]

c. The court of appeals also erred in concluding that the Bank of North Dakota is not a "state bank" within the meaning of 12 U.S.C. 36(c) and (h). The competitive equality between state and national banks that those provisions were designed to preserve could be significantly undermined if states may establish state-owned banks that are not subject to the branching restrictions imposed on private state, and thus private national, banks.[3]

2. The practical import of the decision below is not clear, for the court's errors are largely ones of misplaced emphasis, and the ultimate question whether petitioner's facility is a branch is one that turns on its own particular facts.[4] Because of this, the Solicitor General determined not to file a petition for a writ of certiorari on behalf of the Comptroller. If the instant petition is granted, however, the Comptroller will support petitioner's contention

---

[2]This is particularly true in the case of the Comptroller, who has responsibility for determining the same question in 50 different states and the District of Columbia.

[3]We are informed that the Bank of North Dakota, which has one main banking office in Bismarck, has recently established a branch office in Towner, North Dakota, but it is not yet clear whether that branch is to be temporary or permanent.

[4]The question whether a state-owned bank constitutes a "state bank" appears to be confined to North Dakota, for that state appears to be the only one that has established a significant state-owned commercial bank. Moreover, that bank has not yet engaged in significant branching activities, and its right to do so under North Dakota law has not been authoritatively determined.

that the court of appeals erred in reversing his determination that petitioner's facility is not a branch bank.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

DOJ-1977-09